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No. 87-1794

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM KUANG TSAO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's detention at the Seattle airport was supported by reasonable suspicion that he was engaged in narcotics trafficking.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1988. A petition for rehearing was denied on March 23, 1988. The petition for a writ of certiorari was filed on April 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Washington, petitioner was convicted of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to 10 years' imprisonment, to be followed by a five-year special parole term. The court of appeals affirmed.

1. On October 21, 1986, officers patrolling the Miami International Airport saw petitioner and his companion, Debbie Fine, approach the United Airlines ticket counter. Both were casually dressed; petitioner wore a great deal of gold jewelry and a gold, diamond-studded Rolex watch. As the couple checked three of their four suitcases, the officers noticed that Fine appeared to be under the influence of narcotics and was having difficulty filling out the luggage tags. Tr. 22-24, 41-42, 52, 60.[1]

After petitioner and Fine left the counter, the officers learned from the ticket agent that petitioner was flying under the name "Mike Lee"; that he and Fine had flown to Miami from Seattle on October 18 after having made their reservations the previous day; that they were initially scheduled to return to Seattle via Denver on October 20; and that their first-class tickets cost more than $2400. Petitioner left a callback number with the airline, and the telephone at that residence had been installed only that month.[2] When one of the officers called that number, a person with an Hispanic accent answered the telephone and stated that there was no one named "Mike Lee" at that location. When the officer said that she was from the airline, a second person took the phone and stated that Lee had been there and had left; after speculating that Lee had caught another plane, that person hung up abruptly. The Miami police officers relayed that information to officers

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[1] "Tr." refers to the transcript of the hearing on petitioner's motion to suppress evidence.

[2] Miami Police Officer Jody Wolfe testified that the date of installation was significant because narcotics dealers change their addresses and phone numbers frequently. Tr. 44-45.

in Seattle. The Seattle officers ran a computer check on the names "Debbie Fine" and "Michael Lee." They found nothing on Fine, but found an outstanding Canadian warrant for the arrest of "Michael Robert Lee" on a charge of attempted importation of cocaine into Canada. When the officers attempted to verify the Washington address that petitioner had given the airline, they found that the address corresponded to a building with private "mail stops" or mail boxes, rather than a dwelling. Tr. 24-29, 32-48, 52, 56-66, 136-138, 151-153.

After a one-day delay in Denver due to bad weather, petitioner and Fine arrived in Seattle on October 22, four days after they had left. As they rode a tram to the baggage claim area, petitioner appeared nervous and "was looking around." After petitioner had collected the baggage, Seattle Detective Gregory Watts approached petitioner, identified himself, and asked to speak with him. Petitioner agreed (Tr. 70; Pet. App. 5-6). Upon a request for identification, petitioner gave Watts an expired driver's license bearing the name "William Tsao." After examining the license, the officer concluded that petitioner was not the individual named in the Canadian warrant. Detective Watts then asked to see petitioner's airline ticket. After petitioner handed the ticket to the detective, Watts saw that it had been purchased in the name "Michael Lee." Detective Watts then asked petitioner if he was "Michael Robert Lee." Petitioner replied that he was not. When the officer asked why he was traveling under the name "Michael Lee," petitioner replied, "What seems to be the problem?" (Tr. 71). Detective Watts asked petitioner if he would consent to a search of his luggage, and petitioner replied that he wanted to speak to an attorney first. Tr. 66-74, 136-143.

Meanwhile, another officer had moved petitioner's luggage to another area within the airport. There, the officer

had the luggage examined by a narcotics detection dog, and the dog alerted to one of the bags. At that point, approximately 15 minutes had elapsed since the initial contact with petitioner, and five minutes since the bags were removed for examination by the dog. After the officers advised petitioner of the results of the examination, petitioner again said that he wanted to speak to an attorney. Petitioner was then escorted to an office within the terminal, where he was permitted to call a lawyer. As petitioner was making his call, the officers conferred and decided that they had probable cause to arrest him. At the conclusion of petitioner's call, the officers arrested petitioner, searched him, and found a bindle of cocaine on his person. Thereafter, the officers obtained a search warrant for petitioner's suitcase. A search of the suitcase revealed two kilograms of cocaine. Tr. 74-82, 143-147, 170-172.

2. The district court denied petitioner's motion to suppress the cocaine as the fruit of an illegal detention (Tr. 259). The court held that the initial encounter between petitioner and the Seattle officers was consensual. In addition, the court held that the fact that the officers retained petitioner's expired license and cancelled ticket did not transform the encounter into a seizure, because petitioner's trip was completed and the license was no longer valid. The retention of those documents therefore did not impede petitioner in the event that he wanted to leave. In any event, the court found that the agents had ample justification for a *Terry* stop. Tr. 127-132, 255-256, 265-273.

3. The court of appeals affirmed. Pet. App. 1-30. It held that the initial contact between petitioner and the officers at the Seattle airport was consensual. *Id.* at 15-18. The encounter did not ripen into a *Terry* stop, the court held, until the officers asked petitioner for consent to search his luggage. By that time, however, the officers had

reasonable suspicion that petitioner was in possession of narcotics, which justified the brief detention of petitioner's luggage for examination by a narcotics detection dog. *Id.* at 19-21. Once the dog alerted, the officers had probable cause to arrest petitioner, the court held, and the officers could therefore search him incident to his arrest. *Id.* at 21.[3]

ARGUMENT

Petitioner argues that he was seized when Detective Watts approached him at the Seattle Airport and that his seizure was not supported by reasonable suspicion.

The initial encounter between petitioner and the Seattle officers did not amount to a seizure under the Fourth Amendment. Without physically restraining petitioner or displaying a weapon, Detective Watts asked petitioner for permission to speak to him, and petitioner agreed. Detective Watts then asked petitioner for some identification and his airline ticket, and petitioner handed the detective an expired driver's license and his cancelled airline ticket. That type of consensual police-citizen encounter does not amount to a "seizure" under the Fourth Amendment. *INS* v. *Delgado,* 466 U.S. 210, 216-217, 219-221 (1984); *Florida* v. *Royer,* 460 U.S. 491, 497, 501 (1983) (plurality opinion); *United States* v. *Mendenhall,* 446 U.S. 544, 553-556 (1980) (opinion of Stewart, J.); see *Michigan* v. *Chesternut,* No. 86-1824 (June 13, 1988), slip op. 5-8; *Terry* v. *Ohio,* 392 U.S. 1, 19 n.16 (1968).

Petitioner does not disagree. Rather, he contends (Pet. 10) that he was seized when Detective Watts did not return

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[3] The court also upheld the warrant-authorized search of petitioner's luggage. The court rejected his claim that the supporting affidavit contained material factual misrepresentations. Pet. App. 22-25.

his airline ticket and driver's license after examining them, when he was not immediately allowed to use a nearby telephone to contact a lawyer, and when his luggage was briefly held so that it could be examined by a narcotics detection dog.[4] By that time, however, the officers had reasonable suspicion that petitioner may have been involved in narcotics trafficking.

The officers knew the following facts by the time they moved petitioner's luggage from the cart so that it could be examined by a narcotics detection dog: (1) petitioner had spent more than $2400 on round-trip tickets from Seattle to Miami, a major source city for narcotics; (2) petitioner and his companion had stayed in Miami only two days, even though the round trip between Seattle and Miami is about 6000 miles; (3) petitioner's companion appeared to be under the influence of narcotics when she was filling out the baggage claim tickets; (4) petitioner was not known by the first person who answered the telephone at the callback number that petitioner had given the airline, and the reply given by the second person who answered the call was suspicious; and (5) petitioner was traveling under an assumed name, he offered no explanation for doing so, and he nervously looked around the Seattle terminal after he had deplaned.

This Court and the courts of appeals have recognized that factors such as those are indicative of narcotics trafficking. See, *e.g.*, *Florida* v. *Royer,* 460 U.S. at 502 (plurality opinion); *United States* v. *Mendenhall,* 446 U.S.

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[4] Petitioner points out (Pet. 5-6, 11) that the officers would have arrested petitioner had he attempted to leave the airport at that point. That fact is immaterial, however, because petitioner did not attempt to leave, the officers did not arrest him at that point, and they did not communicate their intentions to him. Accordingly, the officers' intentions did not transform their investigative detention into a full-scale arrest. See *Michigan* v. *Chesternut,* slip op. 7 n.7.

at 564-565 (opinion of Powell, J.); *United States* v. *Whitehead,* No. 87-5093 (4th Cir. May 24, 1988), slip op. 20; *United States* v. *Hanson,* 801 F.2d 757, 761-763 (5th Cir. 1986); *United States* v. *Ilazi,* 730 F.2d 1120, 1124 (8th Cir. 1984). An experienced narcotics officer viewing the whole picture (see *United States* v. *Cortez,* 449 U.S. 411, 417 (1981)) could reasonably infer from those facts that petitioner was bringing narcotics back to Seattle from Miami. Accordingly, the Seattle police officers had sufficient grounds for briefly detaining petitioner's luggage so that it could be examined by the narcotics detection dog. Once the dog alerted to the presence of narcotics, the officers had probable cause to arrest petitioner and to search his person. See *United States* v. *Robinson,* 414 U.S. 218 (1973).

Although we believe that the court of appeals' ruling was correct, this Court may nonetheless wish to hold this case pending its decision in *United States* v. *Sokolow,* cert. granted, No. 87-1295 (June 6, 1988). In that case, the Ninth Circuit adopted a new two-part test for determining reasonable suspicion in the airport context. That test requires that before a law enforcement officer may make a *Terry* stop of a suspected drug courier traveling through an airport, the officer must be able to point to direct evidence that the suspect is involved in narcotics trafficking, and the officer must be able to supply empirical or statistical proof that the circumstantial evidence on which he relies does not also characterize a large number of innocent travelers. Some of the facts in this case are similar to those in *Sokolow,*[5] but there also are some differences.

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[5] Both Sokolow and petitioner were young; they both made brief round trips over long distances to Miami; each suspect paid more than $2000 for a pair of round-trip tickets, which were purchased on short notice; in each case, the officers had reason to believe that the suspect

For example, there was an obvious discrepancy between the name petitioner used for his airline ticket and the name on petitioner's expired driver's license. That fact appears to be the type of direct proof of narcotics smuggling that the Ninth Circuit found critical to the reasonable suspicion determination in *Sokolow*. Accordingly, the judgment in this case may survive even if this Court in *Sokolow* were to endorse the Ninth Circuit's two-part reasonable suspicion test. That is particularly true in light of the fact that the decision below was handed down by the Ninth Circuit, which decided *Sokokow*, and the fact that the court of appeals even cited its earlier decision in *Sokolow* in the court's unpublished opinion in this case. Pet. App. 15, 21. Nevertheless, this Court's decision in *Sokolow* could potentially affect the disposition of this case. We therefore do not oppose holding the petition in this case pending the decision in *Sokolow*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Sokolow*, cert. granted, No. 87-1295 (June 6, 1988), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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was traveling under a false name; and both men nervously looked around the airport terminal.

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